

**Seven Eight Three Manhattan Fruit Exchange, Inc. v  
Jamestown Chelsea Market, L.P.**

2006 NY Slip Op 30108(U)

July 25, 2006

Supreme Court, New York County

Docket Number: 0060136/2006

Judge: Shirley W. Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Kornreich  
Justice

PART 54

Man'n. Trout Exch, Inc.

INDEX NO. 60/364/06

- v -  
Deanestown Chelsea Mkt.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 6 were read on this motion to/for Yellowstone

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1,2

Answering Affidavits — Exhibits \_\_\_\_\_

3,4

Replying Affidavits \_\_\_\_\_

5,6

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

**FILED**

AUG 04 2006

COUNTY CLERK'S OFFICE  
NEW YORK

Shirley Werner Kornreich  
J.S.C.

Dated: 7/25/2006

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
783 MANHATTAN FRUIT EXCHANGE, INC. a/k/a  
SEVEN EIGHT THREE MANHATTAN FRUIT  
EXCHANGE, INC.,

Plaintiff,

-against-

JAMESTOWN CHELSEA MARKET, L.P. and  
JAMESTOWN COMMERCIAL MANAGEMENT  
COMPANY, LLC,

Defendants.

-----X  
KORNREICH, SHIRLEY WERNER, J.:

Index No.: 601364/06

**DECISION  
and  
ORDER**

This is an action for a declaratory judgment and permanent injunction enjoining defendants from taking any steps to terminate plaintiff's lease based on a "Notice to Cure." Plaintiff 783 Manhattan Fruit Exchange, Inc. a/k/a Seven Eight Three Manhattan Fruit Exchange, Inc. ("MFE" or the "Tenant") now moves, by Order to Show Cause, for a Yellowstone injunction, tolling the time to cure, on the ground that it is has not defaulted under the lease.

**I. Background**

On October 12, 1995, plaintiff entered into a lease with M.I.C. Leasing Co. L.P. ("MIC"), defendants' predecessor, for certain commercial space in Chelsea Market, located at West 15th Street between 9th and 10th Avenues (the "premises" or "market"). In late 2003, defendant Jamestown Chelsea Market, L.P. (The "Landlord" or "JCM") purchased the premises from MIC and, thereafter, Jamestown Commercial Management Company, LLC ("JCMC") managed the premises. According to plaintiff's affidavit, after purchasing the market defendants "embarked

on a campaign the sole purpose of which was to compel MFE to give up a substantial portion of its Premises,” due to the fact that MFE’s existing lease provided it with “an under market rent.”

On March 22, 2006, defendants served plaintiff with a Notice to Cure, which stated that MFE:

is in default of its obligations under Articles 1, 29, 41, 42, 52, the Standard Real Estate Tax And Operating Cost Escalation Clause Rider and other applicable provisions of the Lease which require that [MFE] pay Fixed Rental and Additional Rental (collectively, “Rent”) promptly when due without notice or demand therefor, in that [MFE] has failed to pay Rent in the amount of \$153,997.21 for the period from December 1, 2005 through March 1, 2006[.]

Annexed to the Notice was an invoice setting forth various amounts, purportedly outstanding, for base rent, operating expenses as well as late fees. At the same time, a separate monthly billing statement dated March 1, 2006, provided that MFE owed \$335,643.82, comprised of billing dating back to December 1998—prior to defendants’ purchase of the premises.<sup>1</sup>

Plaintiff has submitted copies of checks made out to JCM for its base rent for December 2005 and January, February and March 2006. According to plaintiff, defendants have “reallocate[d] the [rent] payments MFE has made against charges MFE has always disputed, the vast majority of which are for supposed operating cost escalation.” Further, plaintiff disputes the accuracy of defendants’ calculations, which account for MFE’s share of increased operating costs in the amount of \$89,079.64, for 2003 and 2004. Plaintiff avers that it “has substantial income and assets and could easily cure its alleged default by payment of any amounts which may be found to be due.”

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<sup>1</sup> Although this issue is not presently before the court, it appears that some arrears being sought by defendants are beyond the six-year statutory period governing breach of contract claims.

Alane S. Berkowitz, JCMC's vice president avers that at the time JCM acquired the premises, MFE "owed significant amounts of Fixed Rental and Additional Rental . . . to Landlord's predecessor" and also failed to pay rent to JCM thereafter. Although JCM initially sent monthly bills to MFE under "the billing systems put in place and operated by Landlord's predecessor [MIC,]" it later "modified Tenant's billing statements so as to eliminate any reference to Rent due to Landlord's predecessor for the period prior to Landlord's acquisition of the [premises.]" Once defendants made these adjustments, they "re-allocated the payments that had been received from Tenant during the period of Landlord's ownership of the [premises] so as to apply the proceeds from such payments to the oldest outstanding arrears[.]"

In reply, plaintiff avers that defendants' billing/arrears statements, as submitted, fail to acknowledge certain payments remitted by plaintiff in June, July, September, October and November 2004. Further, plaintiff disputes various late charges and interest in addition to the disputed operating expense escalation charges.

## II. *Conclusions of Law*

"The purpose of a Yellowstone injunction is to maintain the status quo so that a commercial tenant may protect its valuable property interest in the lease while challenging the landlord's assessment of its rights." *225 E. 36th St. Garage Corp. v. 221 E. 36th Owners Corp.*, 211 A.D.2d 420 (1st Dept. 1995) *citing Post v. 120 E. End Ave. Corp.*, 62 N.Y.2d 19 (1984). The remedy was developed as an alternative to the "all or nothing" nature of landlord-tenant disputes. *See Post*, 62 N.Y.2d at 25.

The requirements for granting a Yellowstone injunction are "far less than the normal showing required for preliminary injunctive relief." *Id.* However, the moving party must

demonstrate that: (1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) it requested injunctive relief prior to the termination of the lease; and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises. *Garage*, 211 A.D.2d at 420. In determining whether the proponent has the ability to cure, the Court is not limited to considering the proponent's financial or other resources, but may also consider whether the proponent has a genuine desire to cure the defect. *See id.* at 422 (plaintiffs' efforts to cure required desire and ability to cure).

Plaintiff here is entitled to injunctive relief because it has demonstrated: (1) that it holds a commercial lease; (2) that it received a Notice to Cure from defendants; (3) that it requested the instant Yellowstone injunction prior to termination of the lease; and (4) that it is ready, willing and able to cure the default. Although defendants argue that plaintiff's motion should be denied since MFE "has no right to dispute" the billing statements, the court disagrees. Plaintiff disputes the validity and accuracy of the monthly statements, submitting documentary evidence and affidavits in support. Despite defendants' conclusory arguments to the contrary, plaintiff has demonstrated "an ability or willingness to cure the violations." In light of plaintiff's unambiguous assertion of its willingness to cure any default the court may find to exist, a Yellowstone injunction is proper. *See TSI W. 14, Inc. v. Samson Assocs., LLC*, 8 A.D.3d 51, 53 (1st Dept. 2004).

Defendants request that, if the Court does grant plaintiff's motion, it condition the injunction on plaintiff "(a) paying Landlord all future Rent required by the Lease as and when it becomes due; (b) complying with its non-monetary obligations under the Lease, including but not

limited to its obligation to carry insurance in accordance with the terms of the Lease; and (c) depositing the \$153,997.21 in Rent arrears sought in the Notice to Cure with the Court in order to protect Landlord[.]” In the alternative, defendants request that MFE be required to post a bond to secure the payment of the arrears.

Initially, the relief defendants seek as to plaintiff’s insurance of the premises is moot since plaintiff has provided defendants with proof of insurance. However, CPLR 6312 (b) provides that “prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction[.]” Here, an undertaking is appropriate since, if a lease violation is found, defendants may sustain damages. Thus, a bond should be set in the amount of \$175,000. Additionally, plaintiff shall pay use and occupancy equal to the monthly rent as it becomes due during the pendency of this action, without prejudice to either party.

Accordingly, it is

ORDERED that plaintiff’s application for a Yellowstone injunction is granted upon the condition that plaintiff abides by the terms of the Lease and continues to pay monthly use and occupancy as set forth in the Lease; and it is further

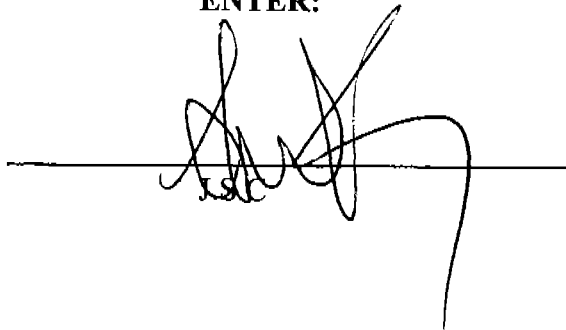
ORDERED that defendants, their agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendants, are enjoined and restrained, during the pendency of this action, from taking any action to cancel or terminate plaintiff’s Lease based on the Notice to Cure, for the Premises; and it is further

ORDERED that within 10 days of service of a copy of this order with notice of entry upon it, plaintiff shall post a bond in the amount of \$175,000. Should either party object to this

portion of the decision and desire a hearing on the amount of the bond, they should contact the court to schedule one; and it is further

ORDERED that all parties are to appear before the court for a preliminary conference on August 17, 2006, at 9:30 a.m. at 111 Centre Street, Room 1227, New York, N.Y.

ENTER:



Dated: July 25, 2006

**FILED**  
AUG 04 2006  
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